



Comptroller General  
of the United States

Washington, D.C. 20548

144654

## Decision

**Matter of:** Pulse Electronics, Inc.--Claim for Costs

**File:** B-243828.2

**Date:** August 19, 1991

Edward C. DeSaussure for the protester.  
Joseph M. Goldstein, Esq., Department of the Air Force, for the agency.  
Aldo A. Benejam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protester is not entitled to award of the costs of filing and pursuing its protest where, in response to the protest, the agency promptly amended the challenged solicitation within 2 weeks after the protest was filed.

### DECISION

Pulse Electronics, Inc. requests that our Office declare the firm entitled to recover the reasonable costs of filing and pursuing its protest concerning request for proposals (RFP) No. F41621-90-R-RA111 (RA111), issued by the Department of the Air Force for 35 circuit cards. The protest, filed April 29, 1991, challenged the provisions in the RFP relating to the submission of cost or pricing data. On May 14, 2 weeks after receiving notice of the protest, the Air Force issued an amendment to the RFP responding to Pulse's objections. We subsequently dismissed the protest as academic.

On May 21, Pulse filed a claim with our Office under our revised Bid Protest Regulations, 56 Fed. Reg. 3,759 (1991) (to be codified at 4 C.F.R. § 21.6(e)), for the costs of filing and pursuing the protest. Pursuant to the revised regulations, if the contracting agency decides to take corrective action in response to a protest, we may declare the protester to be entitled to recover the reasonable costs of filing and pursuing the protest, including attorneys' fees. As a basis for its claim, Pulse asserts that for the 5 months prior to the agency taking corrective action, Pulse maintained what it describes as a "dialogue" with agency officials in an effort to convince them that the requirement for cost or pricing data should be deleted from the RFP. According to

Pulse, the requirement was inconsistent with the notion of highly competitive procurements. The protester argues that we should declare that it is entitled to its costs because agencies otherwise will have no incentive to swiftly resolve matters brought to their attention, except when a protest is filed in our Office.

Before the recent revision to our regulations, we did not award costs in cases where an agency took corrective action prior to our issuing a decision on the merits of the protest. We became concerned, however, that some agencies were taking longer than necessary to initiate corrective action in the face of meritorious protests, thereby causing protesters to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. We concluded that providing for the award of costs in cases where the agencies delayed taking corrective action would encourage agencies "to recognize and respond to meritorious protests early in the protest process." 55 Fed. Reg. 12,834, 12,836 (1990).

As initially proposed, section 21.6(e) of our regulations would have permitted us to award costs in cases where the agency notified us of a decision to take corrective action after the due date for submission of the agency report on the protest. 55 Fed. Reg. 12,838. As adopted, section 21.6(e) permits the award of costs without regard to the report due date. We stated in the explanatory material accompanying the promulgation of the final regulations that, rather than basing our decision on the report due date, deciding whether to award costs was more appropriately based on the circumstances of each case, including when in the protest process the contracting agency decided to take corrective action, and when that decision was communicated to us and to the protester. In this respect, we noted that there may be circumstances where the award of costs would not be justified, even where corrective action was taken after submission of the report, just as there may be circumstances where the award of costs would be appropriate even where corrective action was taken prior to the submission of the report. See 56 Fed. Reg. 3,762.

In adopting the revised regulations, it was not our intention to award protest costs in every case where the agency takes corrective action in response to a protest. Since our concern was that some agencies were not taking corrective action in a reasonably prompt fashion, our intent was to award costs where, based on the circumstances of the case, we find that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest. We find that based on the record before us, there is no evidence that the agency unduly delayed taking corrective action in this case.

Although Pulse claims costs incurred only in connection with its protest of RFP No. RA111, it appears from its submissions that Pulse bases its claim on its "dialogue" with the agency pertaining to three different solicitations, including RFP No. RA111, all of which were issued by the agency's Electronic Security Command (ESC). The record shows, for example, that on December 28, 1990, Pulse filed an agency-level protest with ESC challenging the terms of RFP No. F41621-90-RA092 (RA092). According to Pulse, RFP No. RA092 contained the same provisions relating to the submission of cost or pricing data as complained of in its protest of RFP No. RA111 to our Office. ESC denied Pulse's protest of RFP No. RA092 on February 28. Pulse concedes that since that solicitation was subsequently canceled for reasons apparently unrelated to its protest, the issues raised by its agency-level protest were rendered academic, and, in our view, are therefore irrelevant to its claim.

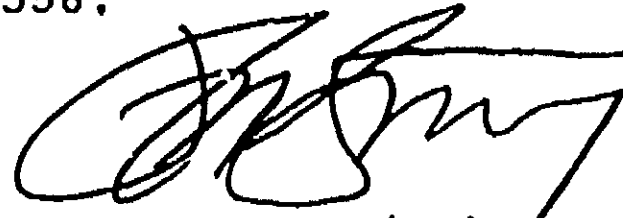
Subsequently, on April 19, 1991, Pulse again raised an objection with ESC, this time challenging the cost or pricing data provisions in RFP Nos. RA111 and F41621-90-R-RA0112 (RA0112). ESC responded to Pulse's objections in a detailed letter dated April 22, only 3 days later. Attached to the letter were amendments to RFP Nos. RA111 and RA0112, revising the challenged provisions. ESC's letter clarified the agency's rationale for including the provisions in the RFPs; explained the agency's position; and described several situations where the agency felt it may be necessary to request cost or pricing data. Apparently not fully satisfied with ESC's response, in an April 24 telefacsimile which referenced only RFP No. RA111, Pulse informed ESC of its intent to file a protest in our Office unless the challenged provisions were deleted from the RFP. Before the agency responded, Pulse filed its protest in our Office on April 29.<sup>1/</sup>

Pulse's allegations that the agency did not take corrective action quickly after it was notified of Pulse's objections are not supported by the record. The agency made a good faith effort to fully explain its position and amend RFP Nos. RA111 and RA0112 in its April 22 letter, within only 3 days of Pulse filing its written objections with ESC. The fact that the agency's response did not satisfy the protester, or that the agency subsequently took further steps to amend the solicitation in response to Pulse's protest, does not in any way detract from the promptness of the agency's action. In connection with Pulse's protest of the terms of RFP No. RA111 to our Office, the agency took corrective action within

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<sup>1/</sup> Our records indicate that Pulse did not file any protests in our Office pertaining to RFP Nos. RA092 or RA0112.

2 weeks of being notified of Pulse's filing of its protest. Such action taken early in the protest process is precisely the kind of prompt reaction to a protest that our regulation is designed to encourage. See, e.g., Leslie Controls, Inc.--Claim for Costs, B-243979.2, July 12, 1991, 91-2 CPD ¶ 558 (protester not entitled to award of costs of filing and pursuing its protest where agency amended challenged solicitation within 1 month after the protest was filed). Since Pulse has provided no evidence that the agency unduly delayed taking corrective action in this case, Pulse's claim for costs is denied. See Oklahoma Indian Corp.--Claim for Costs, B-243785.2, June 10, 1991, 70 Comp. Gen. \_\_\_, 91-1 CPD ¶ 558.



James F. Hinchman  
General Counsel